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Nos. 87-273 and 87-381

In the Supreme Court of the United States

OCTOBER TERM, 1987

ST. JOHN STEVEDORING COMPANY, ET AL.,
PETITIONERS

v.

JOHNETTA WILFRED

ALENE C. JONES, PETITIONER

v.

ST. JOHN STEVEDORING COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a surviving dependent parent's death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, may be subject to an offset as the result of a third-party settlement signed by the decedent and the surviving parent.

2. Whether the court of appeals properly concluded that a surviving minor child is entitled to death benefits under the Longshore and Harbor Workers' Compensation Act, as an "acknowledged illegitimate child dependent upon the deceased," where ample uncontroverted evidence indicated both acknowledgement of paternity and dependency.

3. Whether a surviving minor child's claim to receive death benefits under the Longshore and Harbor Workers' Compensation Act may be extinguished or reduced by a settlement of a third-party tort suit that was entered into by the employee on behalf of himself and his "heirs [and] next of kin," but in which the child was not separately represented.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (St. John Pet. App. A1-A7)[1] is reported at 818 F.2d 397. The opinion of the Benefits Review Board (St. John Pet. App. B1-B9) is reported at 18 Ben. Rev. Bd. Serv. (MB) 68. The opinion of the administrative law judge (St. John Pet. App. C1-C10) is reported at 17 Ben. Rev. Bd. Serv. (MB) 109.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1987. Petitions for rehearing were denied on

[1] "St. John Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-273.

July 1, 1987 (St. John Pet. App. A8-A9). The petition for a writ of certiorari in No. 87-273 (St. John Pet.) was filed on August 15, 1987. The petition for a writ of certiorari in No. 87-381 (Jones Pet.) was filed on September 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. John Henry Jones was injured on May 27, 1979, while working for petitioner St. John Stevedoring Co. (St. John) (St. John Pet. App. A1, B2, C3). As a result of that injury, St. John paid compensation benefits to Jones under the Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.*

The issues in this case arise from an agreement entered into on December 23, 1981, settling a tort suit Jones had brought against third parties in connection with his injury (St. John Pet. App. A1-A2).[2] The settlement agreement[3] was executed by Jones, his mother (petitioner Alene Jones), his employer (St. John), the employer's insurer (Insurance Company of North America (INA)) and several tort defendants (*id.* at A2), and provided that the tort defendants would immediately pay to Jones $1.78 million, and further provided for prospective annual payments of $280,000 for the rest of Jones's life, commencing in December 1982 (*ibid.*).[4] The settlement agreement contemplated that if Jones died before December 1986, then the annual payments would continue to be paid through December 1986 to his mother or, in the event of

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[2] By the date of the settlement Jones's LHWCA compensation totaled $291,839.71 (St. John Pet. App. A1).

[3] The settlement agreement is reproduced at pages 24-33 of the appendix to the petition for a writ of certiorari in No. 87-381.

[4] In addition, Jones's mother received an immediate cash payment of $5,000 (Pet. App. A2).

her death, to Jones's estate (*ibid.*). In addition to resolving all claims against the third-party tortfeasors, the settlement provided that St. John and its insurer would be fully reimbursed for the benefits they paid under the LHWCA and would receive " 'a credit * * * for accrual of all compensation benefits and medical expenses in the future' " (*ibid.*). The settlement agreement specified the parties' intent to bind Jones's " 'heirs, executors, administrators, assigns, next of kin, or other legal representatives' " (*id.* at A6).

Jones died in June 1982, before the date upon which the first annual payment prescribed in the agreement was due (St. John Pet. App. A2, B2, C3). Under the terms of the settlement, therefore, Jones's mother received more than $1.4 million ($5,000 plus five annual payments of $280,000 each) (*id.* at A6). Independent of the settlement, Jones's mother filed a separate claim under Section 9 of the LHWCA, 33 U.S.C. 909, for death benefits from the employer, as did Sheryl Wilfred, on behalf of Jones's alleged minor daughter Johnetta Wilfred (Pet. App. A2, C1). Those latter claims are the subject of this action.

2. The administrative law judge (ALJ) awarded LHWCA death benefits to Jones's mother on the ground that she had been economically dependent on Jones (St. John Pet. App. C4), but denied benefits to Jones's putative daughter (*id.* at C10). The ALJ explained that state law is dispositive on the question whether a claimant is decedent's "child" for purposes of statutory eligibility[5] "because the LHWCA does not define this operative term" (*id.* at C5). The ALJ concluded that, under the standards established by the law of Louisiana (the state in which the

[5] Section 2(14) of the LHWCA, 33 U.S.C. 902(14), says that a child entitled to death benefits includes an "acknowledged illegitimate child dependent upon the deceased."

the child was domiciled (*id.* at C5-C6)), "it ha[d] not been definitively established that the decedent was the natural father" (*id.* at C9).

3. The Benefits Review Board (BRB or the Board) reversed the ALJ's denial of benefits to the child (St. John Pet. App. B9).[6] The Board ruled that federal, not state, law controlled whether Jones had acknowledged paternity for purposes of the Act, and that, under federal law, "the evidence overwhelmingly supports a finding of acknowledgement" (*id.* at B4). The Board also concluded that "uncontradicted testimony" established the child's dependency as a matter of law (*id.* at B6) and that she was therefore entitled to receive statutory death benefits.

The Board affirmed the ALJ's award of benefits to Jones's mother. It rejected (St. John Pet. App. B7) the argument that Section 33(g) of the Act, 33 U.S.C. 933(g), requiring third-party settlement agreements to be approved in writing by the employer and timely filed with the Department of Labor, bars statutory compensation here. That provision, it said, is applicable only if the amount of the third-party settlement is less than the compensation awarded under the Act, and in this case the settlement was for considerably more than the amount of statutory death benefits (St. John Pet. App. B7). Further, the Board stated (*ibid.*) that, in any event, the procedural formalities of Section 33(g) did not apply to Jones's mother because, as Jones was still living at the time of the settlement, his mother was not then a "person entitled to compensation" in the form of death benefits within the meaning of Section 33(g)(1), 33 U.S.C. (Supp. III) 933(g)(1).

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[6] The Director, Office of Workers' Compensation Programs, to whom the Secretary of Labor has delegated authority to administer the Act (20 C.F.R. 701.202, 802.410(b)), is an automatic party in LHWCA cases. 20 C.F.R. 801.2(10); *Ingalls Shipbuilding Division* v. *White*, 681 F.2d 275, 279 (5th Cir. 1982); *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 482 (D.C. Cir. 1982).

Relying upon its conclusion that Jones's mother was not a "person entitled to compensation" within the meaning of Section 33(g), the Board also reasoned that St. John was not entitled under Section 33(f), 33 U.S.C. 933(f), to reduce its LHWCA benefits payments to Jones's mother to reflect the third-party settlement (St. John Pet. App. B8). In the Board's view, "the settlement was entered into prior to death and presumably compensated the employee and mother for loss due to the employee's disability, rather than loss due to his death" (*ibid.*).

4. The court of appeals affirmed the Board's award of benefits to Jones's illegitimate child and reversed the Board's denial of St. John's request that money paid pursuant to the settlement be credited against benefits owing to Jones's mother (Pet. App. A7).

The court of appeals reasoned that Johnetta Wilfred was an "acknowledged illegitimate child dependent upon the deceased" (33 U.S.C. 902(14)), and thus was entitled to LHWCA death benefits. The court relied (St. John Pet. App. A4) on *Texas Employers' Insurance Ass'n* v. *Shea*, 410 F.2d 56 (5th Cir. 1969) and *Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78 (9th Cir. 1939)), to support the proposition that even if state law precludes a designation of paternity, LHWCA benefits may still be awarded if a paternal link is proved. On the facts of this case, the court of appeals concurred in the Board's conclusion that " 'the evidence overwhelmingly supports a finding of acknowledgment' " (St. John Pet. App. A4). The court also agreed with the Board that the child, who was in utero at the time of Jones's injury, was dependent on Jones (*id.* at A4-A5).

With respect to Jones's mother, the court stated that it "do[es] not disagree necessarily with the reasoning of the BRB on th[e] statutory interpretation" that Jones's mother was statutorily barred from death benefits or required by statute to set off settlement monies against them, because

at the time the settlement agreement was formalized she was not a "person entitled to compensation" under either Section 33(g) of Section 33(f) of the LHWCA. But the court also found that by participating in the settlement Jones's mother had "obligated herself to give the employer and compensation carrier credit for all sums she received as a result of the tort settlement agreement" (St. John Pet. App. A6). Since her recovery under the settlement would far exceed any death benefits under the LHWCA, the court therefore decided that St. John and its insurer "are entitled to a credit for the full amount of compensation benefits owed to the decedent's mother" (*ibid.*).

By contrast, the court rejected St. John's argument that a similar set-off should be applied to the minor child's LHWCA benefits. Although the settlement agreement purported to bind Jones's " 'heirs * * * [and] next of kin' " (St. John Pet. App. A6), at the time of the settlement Johnetta Wilfred was not represented by a statutory guardian responsible for protecting her rights (§ 11, 33 U.S.C. 911). The court therefore concluded that Jones lacked authority to settle or waive in advance any right to death benefits that might accrue to his child (St. John Pet. App. A7).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioners in No. 87-273 (St. John and INA) contend (Pet. 7-10) that the court of appeals and the Board improperly substituted their views for those of the ALJ on the question of filiation and impermissibly made findings as to dependency even though the ALJ had not reached that issue. Petitioners, however, misperceive the nature of

the review function exercised by the Board and affirmed by the court of appeals.

Section 9(c) of the LHWCA, 33 U.S.C. 909(c), entitles a surviving "child" to death benefits in the event of an "injury [that] causes death,"[7] and Section 2(14), 33 U.S.C. 902(14), defines "child" as including an "acknowledged illegitimate child dependent upon the deceased." The ALJ held (St. John Pet. App. C5-C6) that state law governs the question whether one is a decedent's "child" within the meaning of the Act "because the LHWCA does not define this operative term."

The Board correctly applied federal rather than state law to this issue and the court of appeals correctly upheld that decision. It has long been settled that in determining whether an illegitimate child is entitled to benefits under the Act, the statutory definition is "complete in itself" and does not require resort to state law. *Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78, 81 (9th Cir. 1939) ("Congress having provided all definitions necessary to the determination of whether claimant is a 'child' and its authority being paramount and exclusive as to the subjects on which it has legislated, it is not allowable to go beyond the Act provisions.").[8] It is likewise settled under the

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[7] At the time of the employee's death in 1982, the LHWCA also provided death benefits "if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(d), 86 Stat. 1253-1254. That broader death benefits provision was in effect between 1972 and 1984. See, *e.g.*, *Travelers Insurance Co.* v. *Marshall*, 634 F.2d 843 (5th Cir. 1981).

[8] Having found that the ALJ's findings of filiation rested on an erroneous view of the law, the Board correctly set them aside on that basis. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982). See also *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *United States* v. *Singer Mfg. Co.*, 374

LHWCA that acknowledgment—the statutory standard for paternity[9]—"does not require a notary's seal or any other ritualistic proclamation." *Texas Employers' Insurance Ass'n* v. *Shea*, 410 F.2d 56, 61 (5th Cir. 1969).

U.S. 174, 194 n.9 (1963). Moreover, as the court of appeals noted (St. John Pet. App. A4), the Board "readily concluded that 'the evidence overwhelmingly supports a finding of acknowledgment.' " Remand was unnecessary on the question of filiation because "the record permits only one resolution of the factual issue." *Pullman-Standard*, 456 U.S. at 292 (citing *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974)). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).

For the same reason, there was no need for the Board to remand to the ALJ on the question of dependency. Johnetta Wilfred was conceived five days before her father was injured, and "[d]uring the time Sheryl Wilfred carried Johnetta to term, she received regular financial aid from John Henry Jones" (St. John Pet. App. A5). The court of appeals, concurring in the Board's finding of dependency, emphasized (*ibid.* (emphasis in original)):

> The uncontroverted testimony reflects that from the time Johnetta was *in utero*, and continuing to the date of his death, John Henry Jones sent Ms. Wilfred hundreds of dollars for their support, notably in regular payments. In addition, he bought the child clothing and gifts.

As the court held (*ibid.*), these facts fully established dependency under the LHWCA. See *Texas Employers' Insurance Ass'n* v. *Shea, supra; United States* v. *Fidelity & Guaranty Co.* v. *Britton*, 188 F.2d 674 (D.C. Cir. 1951); *Standard Dredging Corp.* v. *Henderson*, 150 F.2d 78 (5th Cir. 1945); *Texas Employers' Insurance Ass'n* v. *Sheppeard*, 62 F.2d 122 (5th Cir. 1932).

[9] Petitioners suggest (St. John Pet. 7-8), based on *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), that the acknowledgment requirement is unconstitutional. Even if this argument were meritorious, it would not help their case; eliminating acknowledgment as a factor would not strengthen the employer's case because it would become easier for a child to establish entitlement to benefits. In any event, *Weber* held that a state worker's compensation statute violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against an unacknowledged illegitimate who was otherwise dependent on the injured worker. "[D]ependency, not the legality

2. Petitioner in No. 87-381, Jones's mother, contends (Pet. 9) that the court of appeals incorrectly required her to set off against her statutory death benefits the amount received from the third-party tortfeasors—thus entirely cancelling out her claim to statutory benefits.[10] She contends that since she was not entitled to any benefits under the LHWCA at the time the third-party settlement was executed, the settlement could not have extinguished her statutory right to death benefits (*id.* at 10). In the alternative, petitioner contends that her participation in the settlement was not fatal to her right to receive death benefits under the LHWCA as a matter of contract interpretation (*id.* at 11-14).

The Board held, and the court of appeals did "not disagree necessarily" that Mrs. Jones's entitlement to benefits was not barred by her failure to comply with the procedural requirements of Section 33(g), nor were her benefits subject to an offset under Section 33(f). Section 33(g) provides that in order for a "person entitled to compensation" to compromise a claim against a third-party for less than the total compensation payable under the statute, that person must first secure the employer's permission to settle. That Section is not applicable here because the settlement amount *exceeded* the death benefits (see note 10, *supra*). Section 33(f),[11] which generally provides for off-

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of the father's nuptials, [has always been] the keynote of coverage" under the LHWCA (*Texas Employers' Insurance Ass'n* v. Shea, 410 F.2d 56, 59 (5th Cir. 1969)).

[10] As previously noted (page 3, *supra*), petitioner received $5,000 in her own right during Jones's lifetime, and $1.4 million after his death under the contingency provided for in the settlement. By contrast, petitioner's statutory death benefits could not amount to more than a few thousand dollars a year. See St. John Pet. App. B7 & n.5.

[11] Section 33(f), 33 U.S.C. (Supp.III) 933(f), provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the

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set of third-party tort recoveries against compensation benefits, likewise does not apply because, as the Board stated, Mrs. Jones was not a "person entitled to compensation" within the meaning of that section at the time she entered into the settlement (St. John Pet. App. B7-B8). The court of appeals, without questioning any of this reasoning, "perceiv[ed] a contractual basis for requiring a credit," arising from an explicit term of the settlement agreement which Jones's mother signed (*id.* at A6).

The issue does not warrant further review. The decision of the court of appeals rests on the particular language of the settlement agreement in this case, a factbound determination lacking in general application or significance other than to the parties. In any event, the court of appeals reached the correct result.[12]

> employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

The Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §§ 21(c) and (d), 98 Stat. 1652, amended Section 33(f) and (g) in ways that are not material to the disposition of the petitions in this case.

[12] Like the court of appeals, we do not quarrel with the Board's conclusion that because Jones's mother was not then entitled to LHWCA benefits Section 33(f) was inapplicable when the settlement was executed. A basic principle of workers' compensation law is that a dependent's right to death benefits is independent from the employee's compensation claim and does not arise until the employee's death. 2 A. Larson, *The Law of Workmen's Compensation* § 64.11 (1987); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979) ("the cases under the Longshoremen's Act have consistently held that the right to death benefits is separate and distinct from the right to disability benefits and does not arise until death occurs"); *International Mercantile Marine Co.* v. *Lowe*, 93 F.2d 663, 665 (2d Cir.) ("[w]hen death occurs, a new cause of action arises which requires an

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3. Petitioners in No. 87-273, St. John and INA, further contend (Pet. 5-7) that the third-party settlement entitled them to an offset against the future death benefits not only of Jones's mother—a signatory to the agreement—but against the future death benefits of the minor daughter as well. In support of this contention, petitioners recite (*id.* at 6) that Jones settled his third-party claim, not only for himself, but also for his " 'next of kin' " and thereby cut off the child's claims against the third-party tortfeasors.

The court of appeals stated that Jones "did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter" (Pet. App. A7). As the court noted (*ibid.*), the LHWCA favors the protection of the rights of minors, specifically through the appointment, as appropriate, of a guardian "by a court of competent jurisdiction." 33 U.S.C. 911. In the present case, there was no court-appointed legal guardian to represent the

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adjudication on all questions such as accident, notice of death, claim, causal relationship, and dependency"), cert. denied, 304 U.S. 565 (1938).

The Board's view would not preclude the possibility that Section 33(f) became applicable when Mrs. Jones became "entitled to compensation," viz., at the moment of her son's death. Under this reading, any amount that she recovered under the settlement agreement before her son's death would not be subject to the statutory offset. The amount she received after his death, however, could be offset against future death benefits if the settlement agreement contemplated that result. Since such an offset, limited to payments received after the settling parent became entitled to benefits, is permitted by the language and purpose of Section 33(f), it is not inconsistent with the policy against release of statutory entitlements expressed in Section 16 of the LHWCA, 33 U.S.C. 916. See *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F.2d 265 (N.D. Ill. 1930). Moreover, recognition of an offset under Section 33(f) fully effectuates the statutory policy against double recovery. *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 542 (1933). See also *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 79, 87 (1980); *Carter* v. *Director, OWCP*, 751 F.2d 1398, 1400-1402 (D.C. Cir. 1985).

interests of the child in the settlement. Unlike Jones's mother, therefore, his daughter did not participate in execution of the settlement, and she received nothing under the settlement either before or after her father's death. On the other hand, petitioners St. John and INA had intervened in the third-party suit and were parties to the settlement. See Jones Pet. App. 24, 32-36. Petitioners' interests were fully represented and they have no cause to complain that the settlement indirectly prejudiced their rights as against the unrepresented minor.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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